

002-BC

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE GOVERNOR'S JOB TRAINING OFFICE

Tri-County Action Programs, Inc.,

Complainant,

V.
FACT

FINDINGS OF
CONCLUSIONS

AND
Service Delivery Area No. 5,
Private Industry Council,
Harold Birkeland, Chairman,

RECOMMENDATION

Respondent.

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge for the State Office of Administrative Hearings, at 1:30 p.m. on September 17, 1984, and at 10:00 a.m. on October 4, 1984, in the offices of the State Department of Economic Security, 6th floor, American Center Building, 160 E. Kellogg Boulevard, St. Paul, Minnesota 55101.

Appearances: Richard E. Holm, Executive Director, 728 South Benton Drive, Sauk Rapids, Minnesota 56379, appeared on behalf of Tri-County Action Programs, Inc. (Tri-CAP or Complainant); and Paul A. Weingarden, Attorney at Law, Suite 160, 6800 France Avenue South, Minneapolis, Minnesota 55435, appeared on behalf of Service Delivery Area No. 5, Private Industry Council, Harold Birkeland, Chairman (PIC or Respondent).

The record herein closed on October 10, 1984, the date the parties stipulated to the receipt into evidence of a late filed exhibit and the last date set by the administrative law judge for submitting written final argument or briefs.

This hearing is being held pursuant to the grievance procedure and hearing requirements contained in the Job Training Partnership Act (JTPA), Public Law 97-300, 29 USC 1501, et seq., and 20 CFR 629.52. This report has been submitted to the Governor of the State of Minnesota who is empowered under federal statute and rules to render a final decision in this case.

STATEMENT OF ISSUES

The issue to be determined herein is whether SDA No. 5 PIC's selection of Regional Professional Vocational Services, Ltd., as the service provider for delivery of training under the JTPA should be set aside and the various issues arising therefrom, including the following:

1. Whether Regional Professional Vocational Services, Ltd. (RPVS) is a qualified service provider under 107(a) and 107(b) and 205(b)(4) of JTPA and implementing regulations;

2. Whether the selection of RPVS gave proper consideration to its legal status and ability to guarantee personnel and fiscal responsibility;

3. Whether the fact that the incorporators of RPVS, who were at the time of the presentation of the service delivery proposal, employees of the State of Minnesota, the former service provider, created a conflict of interest so as to void the selection of RPVS as a service provider;

4. Whether the payment of a salary to employees of RPVS for their services to the corporation when such employees are also members of the board of directors of the corporation is a violation of either governing statute or the articles of incorporation so as to render the selection of the corporation as a service provider inappropriate.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. For the fiscal year ending June 30, 1984, the State of Minnesota through the Department of Economic Security was the service provider in SDA No. 5 for the PIC under the JTPA. It provided adult, youth and summer youth job training programs pursuant to the federal act and implementing regulations.

2. In the spring of 1984, the PIC had become dissatisfied with the contract in force with the State for the provision of JTPA services. The PIC was not dissatisfied with the quality of services rendered by the field personnel of the State but, rather, was concerned with a lack of communication at the local level and what it perceived to be a use of program funds to support a hierarchical management and supervision level of staff at the state offices.

3. The executive director of the PIC, Mr. Richard Furcht, prepared a draft contract, which had been reviewed and approved by the PIC, for submission to the State for the provision of job training services for the two-year period commencing July 1, 1984. The major provisions of the new contract required more local contact and a performance-based contract. The proposed contract was submitted by the PIC Program Delivery Task Force (Task force) to the State and the proposal was rejected. The State provided an alternative proposal, which the Task Force rejected. By mid-May of 1984, the working relationship between the State and the PIC had become extremely strained.

4. On May 18, 1984, the PIC instructed its executive director to broaden the range of proposals being considered.

5. On May 24, 1984, Tri-CAP submitted a proposal for the provision of job training services to the PIC. Tri-CAP Ex. 1.

6. On May 25, 1984, the Task Force held a meeting at which Mr. Richard Holm discussed the Tri-CAP proposal. Tri-CAP Ex. 14.

7. Until the May 31, 1984, meeting of the Task Force, negotiations with the State for a new contract had continued. At the May 31, 1984, meeting of

the Task Force, it resolved to cease negotiations with the State of Minnesota as a prospective service provider for SDA No. 5 and no further consideration of the State as a service provider occurred.

8. At the May 31, 1984, meeting of the Task Force, Mr. Holm, on behalf of Tri-CAP, stated that he would recommend to the PIC that it retain the State as its service provider and that any alternative entity would have difficulty in placing the requisite implementation machinery in force prior to the effective date of a new contract.

9. On June 8, 1984, at the full PIC meeting, Mr. Holm, on behalf of Tri-CAP, stated that "the PIC has got a track record of not being very stable." Tri-CAP Ex. 6, p. 25. He also stated that it was "tough to desire a contract with conditions when you don't trust the people with whom you are dealing." Tri-CAP Ex. 6, p. 26.

10. After the May 31, 1984, meeting of the Task Force, both the chairman of the PIC and its executive director concluded that Tri-CAP was no longer seriously interested in providing job training services to SDA No. 5.

11. After May 31, 1984, when the State proposal had finally been rejected and there was concern about the continuing nature of the Tri-CAP proposal, the chairman of PIC was directed to seek additional proposals. On or about June 3, 1984, RPVS submitted a proposal to the PIC for the provision of job training services for the two year period commencing July 1, 1984. Tri-CAP Ex. 4.

12. Although the proposal was performance-based, the PIC desired changes in the RPVS proposal for further consideration. On or about June 6, 1984, The final RPVS proposal was submitted to the PIC. PIC Ex. 12. The final proposal of RPVS was approximately \$100,000 less than the final proposal of the State, which was not a performance-based contract.

13. The Tri-CAP proposal for the delivery of job services in SDA No. 5 was performance-based and allowed \$730,418 for salary/benefits/non-personal services, as compared to the final RPVS allowance for salary/benefits/non-personal services of \$898,968 of program funds. The major difference in the two amounts is accounted for by salaries and benefits payable to the employees of the prospective service providers. The salary and benefit allowance afforded to RPVS employees compared favorably to those received in State civil service, while the salaries and benefits to be accorded employees under the

Tri-CAP proposal were markedly lower.

14. At its meeting of June 8, 1984, the entire PIC debated the award of a contract to a service provider within SDA No. 5. The difficulties with the State and its unwillingness to accept a performance-based contract were thoroughly discussed. The Tri-CAP proposal and the RPVS proposal were contrasted. At the June 8 meeting both Mr. Holm on behalf of Tri-CAP and representatives of RPVS attempted to convince the PIC of their worthiness of selection as a service provider. The PIC voted to accept the Task Force report, recommending the execution of a contract with RPVS as the service provider. tri-CAP Ex. 6, pp. 31-32.

15. RPVS is a non-profit corporation whose articles of incorporation were signed on May 11, 1984, and filed of record in the office of the Secretary of

State on May 21, 1984. Tri-CAP Ex. 5. The initial incorporator of RPVS was Robert L. Schmelzer and the officers of the corporation include Mr. Schmelzer

and Gary C. Erickson and Kathleen L. Carney. Tri-CAP Ex. 5. The purpose of the corporation is "to manage and control without profit a variety of direct professional services, related but not limited to employment activities, to the population of Minnesota." Tri-CAP Ex. 5, p. 2.

16. At the time of the formation of the corporation, its officers and directors were all state employees engaged under the Department of Economic Security in service delivery within SDA No. 5. The corporation was formed during the period when negotiations with the State regarding the execution of a new service delivery contract had become strained but were still continuing.

17. Between the date of its incorporation and the rejection by the PIC of the State's contract proposal, the corporation was entirely dormant and there were no contacts between the corporation and the PIC, its executive director, or the Task Force.

18. On the date that the corporation submitted a proposal to the PIC, the directors and officers of the corporation were still state employees, although the longevity of their positions, particularly in their field of expertise, was in serious jeopardy.

19. On the date that the incorporators and officers of RPVS appeared before the PIC to argue the acceptance of its proposal, they were still state employees, although they had taken leave time to attend the PIC meeting.

20. The Department of Economic Security of the State of Minnesota has adopted personnel guidelines containing a code of ethics for its employees. Tri-CAP Ex. 7. Article 3 of that code of ethics, in a variety of sections, prescribes standards which would prohibit an employee from engaging in any business or transaction or professional activity which is or may be in conflict with the proper discharge of his or her duties in the public interest. Tri-CAP Ex. 7, pp. 1-3. The penalty for violation of the conflict of interest regulations contained in the code of ethics is possible disciplinary sanction against the employee's employment status with the State.

21. Although the officers and directors of RPVS had been actively engaged in program service delivery under the applicable statutes for the State of Minnesota as the service deliverer to SDA No. 5, the corporation, itself, had no proven record as either a service deliverer or as a community-based organization providing similar services.

22. RPVS's contract proposal to the PIC contained no specificity regarding personnel assurances or fiscal accountability.

23. Prior to the execution of a contract with RPVS, discussions between the corporation and PIC personnel revealed that the directors and incorporators had familiarity with program delivery requirements and that they were prepared to engage, for fiscal advice, an accounting firm which had responsibilities for program finances and accountability under the prior service delivery contract.

24. Prior to the execution of a contract, RPVS did, in fact, engage the

accounting firm and the contract executed between the PIC and the corporation did include assurances and procedures for accounting and fiscal responsibility. PIC Ex. 13. Tri-CAP concedes that the assurances contained in the final contract satisfy any requirement under either applicable law or the reasonable prudence required in the execution of a public contract involving in excess of \$2,000,000.

25. The personnel to be employed by RPVS are, for the most part, existing or former state employees who were directly involved in service delivery when the State was the service provider under the pre-existing contractual arrangement. Prior to the submission of its proposal, the officers of RPVS had contacted such employees and general interest in working for the corporation was expressed.

26. The integrity of the Tri-CAP proposal depended on employing virtually the same personnel at significantly reduced salary and benefit rates. Tri-CAP did not contact the state employees to determine whether they would, in fact, accept employment from Tri-CAP at the salary and benefit levels proposed.

27. The service delivery contract, as finally executed, allows either party to cancel the contract upon 30 days written notice. Cause for such cancellation must, however, be shown. PIC Ex. 13, Conditions, No. 5.

28. The PIC had been satisfied with the performance of the field personnel of the State in the provision of job training service under the prior contract. A goal in selecting RPVS was to continue the provision of services by essentially the same people without the cost of the hierarchical management structure associated through the State and with more local reporting and accountability. RPVS has, in fact, used virtually the same personnel as were previously providing the same or similar services under the State and the PIC has evidenced its satisfaction with their services. There is no evidence in the record that the provision of services since the execution of the contract by the service provider selected has not been entirely satisfactory.

29. Tri-CAP is a non-profit organization which, unquestionably, qualifies under the JTPA and implementing regulations with respect to both adult and youth employment services. It had provided at least youth employment services for approximately 18 years prior to substitution of the State as the youth employment service provider.

30. The executive director of the PIC, Mr. Richard Furcht had, at one point, been the supervisor of Robert L. Schmelzer when both men were State

employees engaged in job training programs. NW. Furcht, however, provided no advance notice of the Tri-CAP proposal to RPVS and did not consult with the corporation in the preparation of its initial proposal. Nor did he provide RPVS any non-public information with respect to the Tri-CAP proposal that would have given it a competitive advantage in either the submission of a proposal or the selection of the ultimate grant recipient.

31. At the time of the submission of the RPVS proposal, after negotiations with the State had terminated, at least Mr. Schmelzer had received a notice of layoff from State employment, effective June 30, 1984. Other unidentified members of the Department of Economic Security who had been providing job training services as employees of the former service provider for SDA No. 5 had also received notice that they would be terminated, or transferred if warranted by their seniority.

32. Prior to the acceptance of the RPVS proposal and the execution of the contract, Mr. Richard Furcht consulted with a member of the staff of the Department of Economic Security regarding the qualification of the newly-formed RPVS as a service provider under the JTPA. Mr. Furcht was informed by the employee of the Department of Economic Security who, in the past, had been consulted regarding the State interpretation of JTPA provisions and implementing federal rules, that the experience of the directors and employees of RPVS qualified the corporation as a prospective service provider under the federal statute and implementing regulations.

33. By letter dated June 22, 1984, VT. Richard Holm, on behalf of Tri-CAP, filed a formal appeal of the PIC decision to select RPVS as the service provider with PIC, as required by 20 C.F.R. sec. 629.52.

34. No local hearing of the grievance was held and, by letter dated August 20, 1984, the executive director of the PIC notified Mr. Holm that the Tri-CAP appeal was denied.

35. By letter dated August 24, 1984, Mr. Richard Holm, on behalf of Tri-CAP appealed the decision of PIC with respect to the Tri-CAP appeal to the Governor of the State of Minnesota.

36. Tri-CAP, at the hearings herein, withdrew those charges contained in its letter to the Governor dated August 24, 1984, which have not been previously enumerated as issues for determination herein.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Governor's Job Training office have jurisdiction in this matter pursuant to sec. 144 of the Job Training Partnership Act and the implementing federal regulations, 20 CFR 629.52.

2. All relevant substantive and procedural requirements of law or rule have been satisfied in the presentation of the appeal by Tri-CAP and the matter is properly before the Administrative Law Judge.

3. Regional Professional Vocational Services, Ltd. is a qualified service provider under 107(a), 107(b) and 205(b)(4) of the Job Training Partnership Act and implementing regulations.

4. The inclusion in the final contract, as executed, of reasonable assurances and conditions relating to personnel, accounting practices and fiscal responsibility satisfy any requirement of law, rule or reason for the execution of the public contract here at issue.

5. The receipt of a reasonable salary for services as employees of RPVS by persons who are also officers of the corporation does not violate any provision of existing law or provide a basis for the negation of the contract awarded.

6. The status of the directors of the corporation as state employees at

the time of the submission of the initial proposal, subsequent to the rejection of the proposal for service delivery by the State, provides no basis for the negation of the contract awarded.

7. All of the proposals submitted, including that of the State, Tri-County Action Programs, Inc., and RPVS received good faith consideration by the PIC.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMENDATION

It is hereby recommended that the Governor of the State of Minnesota dismiss the appeal of Tri-County Action Programs, Inc. and affirm the action taken by SEA No. 5 PIC in the designation of the Regional Vocational Professional Services, Ltd. as the job training service provider under the Job Training Partnership Act and implementing regulations.

Dated this 16thday of October, 1984.

BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

It is respectfully requested that the Governor serve his final decision upon each party and the administrative law judge by first class mail.

Reported: Tape Recorded.

MEMORANDUM

The facts in the instant proceeding are not open to serious dispute. Certain state employees who were functioning in the area offices of the Department of Economic Security and providing job training assistance under federal legislation formed a corporation when it became clear to them that their jobs were in jeopardy. The PIC determined that, while the field services of the State had been appropriate, the lack of direct local contact and the use of program funds by the hierarchical bureaucratic structure of the State were inappropriate. The refusal of the State to accept a performance-based contract lead to its rejection as the service provider. When it became clear to the now-incorporated state employees that the State's proposal would not be accepted, they submitted a proposal to the PIC. Tri-CAP had previously submitted a proposal but statements made by the executive director of Tri-CAP lead the PIC and its executive director to believe that

Tri-CAP was not seriously interested in providing job training services. Moreover, there had been some history of friction between the PIC and 'tri-CAP

which lead the executive director of Tri-CAP to make public remarks concerning his ability to work with the PIC. Both the RPVS and Tri-CAP would have employed the same people who are now providing services under the grant. There is no evidence in the record that the services provided by RPVS are not entirely satisfactory.

The appeal by tri-CAP raises novel interpretations of the Job Training Partnership Act and implementing regulations and the code of conduct applicable to employees of the Department of Economic Security.

The Administrative Law Judge does not consider it his function to substitute his judgement for that of the PIC, who is directed by statute to evaluate proposals and accept that which is most appropriate for the provision of services. To that end, he has not qualitatively examined the proposals or judged their merits, except as specifically noted in the Findings of Fact. The Administrative Law Judge, rather, limits his function in reviewing the action of the PIC only to determine whether its decision was arbitrary, illegal or reached without observing procedures required by law. *Specialty Equipment Market Association v. Ruckelshaus*, 720 F.2d 124 (DC Cir. 1983).

There is no evidence in the record that, except for the legal arguments advanced, the selection of RPVS as a service provider was not reasonable as an appropriate exercise of discretion that a deliberative body might have made. The Recommendation of the Administrative Law Judge follows, therefore, from his resolution of the legal issues advanced by Tri-CAP.

Initially, Tri-CAP asserts that RPVS, Ltd., is not a qualified service provider under 107(a), 107(b) and 205(b)(4) of the Job Training Partnership Act and its implementing regulations. The argument proceeds on a misinterpretation of Section 107. It is argued that since the grant recipient, as a corporation, had no demonstrated proven history of success in delivering job training assistance, it could not qualify as a service provider. A careful reading of the Act, however, demonstrates that a proven record of performance is only to be the prime consideration in awarding the contract. The statute does not prohibit the award of a contract to an organization that does not have an existing record of performance. To prevail on this issue, Tri-CAP would have to demonstrate that the PIC, in the selection of a service provider, did not give prime consideration to candidates having a proven history of performance. As demonstrated in the record, both the proposals of the State and Tri-CAP did receive good faith, serious consideration by the PIC. The State's proposal was rejected for its failure to accept a performance-based contract, the perception of the PIC that an inordinant amount of program funds were spent on hierarchical levels of review and a lack of local responsiveness. The Tri-CAP proposal was rejected

for a variety of reasons. Statements made by the executive director of Tri-CAP at both a Task Force meeting and a meeting of the full PIC lead PIC officials to reasonably believe that Tri-CAP was not seriously interested in providing services and it believed that the PIC should continue the services of the State, a provider that the PIC had previously found to be unacceptable. Further, statements made by the executive director of Tri-CAP cast doubt on the ability of Tri-CAP to work with the PIC. Tri-CAP apparently perceived in the actions of the PIC what it believed to be instability and it lacked trust in the PIC. Finally, Tri-CAP could not assure the hiring of experienced displaced employees at its budgeted levels. The minutes of both the Task Force meetings and the meeting of the full PIC on June 8, 1984, at

which the proposal of RPVS, Ltd., was given precedence, demonstrates that full debate as to the requirements of the statute and the relative experience of Tri-CAP and the corporation were given serious and extensive consideration. The PIC was in a position in which it was required to select a service provider and implement a program by July 1, 1984. The two entities in the area with a proven history of performance had, for a variety of legitimate reasons, been found to be unacceptable. Under such circumstances, after giving prime consideration and precedence to existing organizations as prospective service deliverers, it selected RPVS, Ltd. Under such circumstances, it fully complied with the statute even if the operative language regarding a proven history of accomplishment is construed to apply to the legal entity. An opposite conclusion would require a PIC to choose amongst only existing organizations, even if those organizations, for legitimate reasons, were found to be unsatisfactory. Such an unreasonable result is clearly not dictated by statute.

The Administrative Law Judge, however, under the facts of the instant case, concludes that the purposes of the act are fully accommodated by applying to the organization the experience of its incorporator and board of directors. The prime purpose of the statute is to provide reasonable assurances, on the basis of past experience, that a service provider will be able to administer the federal grant and accomplish job training assistance in an appropriate fashion. In that regard, the construction of the statute advanced by Tri-CAP has at least surface appeal. If a newly created corporation hires some experienced employees who are subject to the direction and control of inexperienced persons, there are no satisfactory assurances of project performance. Here, however, the corporation is merely a vehicle to provides a continuity of services formerly provided by the State without the disadvantages that the PIC had experienced. The directors and officers of the corporation, who have the responsibility for directing the employees and who, themselves, are employees, have a long history of experience in the provision of job training services. Hence, the Administrative Law Judge need not decide that in every instance the JTPA, when referring to a record of proven ability, refers to the employees of a legal entity. When, however, the directing officers and employees of the entity have such experience and they serve as the board of directors of the corporation, responsible for the overall conduct of the corporation, the Administrative Law Judge concludes that such experience can be attributed to the legal entity.

The Administrative Law Judge also rejects the contention of Tri-CAP that 107(b) and 205(b)(4) of the JTPA require the disqualification of RPVS, Ltd. as a service provider. Section 107(b) merely prohibits using federal funds to duplicate services available locally without such funds. There is no evidence

in the record that RPVS, Ltd. will use program funds to duplicate services otherwise available locally without such funds. With respect to 205(b)(4), the same factors that led the Administrative Law Judge to reject Tri-CAP's argument regarding 107(a) are equally applicable.

The Administrative Law Judge does not intend, however, by his rejection of Tri-CAP's interpretation of the statute, to sanction in all respects the PIC's selection procedure. Sections 103 and 104 of the JTPA require the PIC to develop and consummate a contract for the execution of its responsibilities under the Act as a prerequisite to obtaining and disbursing federal funds. Such a contract, was, in fact, executed in April of 1984. PIC Ex" 15. The Act requires the PIC to develop criteria and procedures for the selection of a

service provider and include such criteria and procedures in its two year plan. JTPA 104(a)(5). The service provider is to be selected in accordance with the criteria contained in the approved plan. 20 CFR 628.3. The PIC has, in fact, delegated to its staff member the responsibility of developing criteria and service provider selection procedures. PIC Ex. 15, p. 4. The approved plan does include examples as a starting point for the development of such guidelines but does not impose them as a requirement for the selection of a service provider. The record does not reflect whether such criteria have in fact been developed by the PIC. It is clear that the sample procedures were not followed. The issue was not argued in the instant case and the required plan has been approved by the Governor as required by law. The Administrative Law Judge will not, therefore, determine the sufficiency of the plan. It is appropriate to observe, however, that the PIC may not have fulfilled its legal responsibility in this respect as a condition to the dispersal of federal funds.

Tri-CAP next asserts that the employees of RPVS who also serve on the corporation's board of directors receive a salary for acting as employees. Tri-CAP's argues that the practice provides grounds for voiding the contract. There is no provision of the Minnesota Non-Profit Corporation Act supporting Tri-CAP's argument. Minn. Stat. 317.20, subd. 5 (1983 Supp.). Nor does any provision of the Internal Revenue Code governing exempt organizations prohibit the practice of paying a person who is also a director of a non-profit corporation for his services as an employee of the corporation. IRC i 503(b)(2). There is no assertion in the record that unreasonable salaries are being paid by RPVS, Ltd. Hence, the Administrative Law Judge rejects the assertion by Tri-CAP that the payment of salaries to employees of RPVS, Ltd. who are also directors of the corporation for their services as employees would render selection of the corporation as a service provider inappropriate or otherwise contrary to law.

The third argument of Tri-CAP is that the proposal made to the PIC by RPVS, Ltd. did not contain usual and customary assurances relating to personnel, accounting practices and fiscal responsibility. Tri-CAP asserts that this obligation arises both under federal statute and as a matter of reason, given the size of the contract involved. Tri-CAP has provided several

examples of the type of grant administration requirements that they believe are lacking in the RPVS, Ltd. proposal. Tri-CAP Ex. 9; Tri-CAP El. 10. While Tri-CAP believes that appropriate personnel, accounting and fiscal responsibility provisions should have been included in the initial proposal of RPVS, Ltd., it does not contend either as a matter of law or reason, that the specific material included in the exhibits referenced were required to be contained in the submitted proposal. Further, Tri-CAP admits that the contract finally executed contains every procedure for fiscal and accounting responsibility and assurances of program management that could rationally be required. While Tri-CAP asserts that the completeness of the contract as finally executed does not save the initial proposal, it is important to note that Tri-CAP did not include in its proposal, which by implication it contends that the PIC should have accepted, the material, assurances or procedures that are referenced in Tri-CAP Ex. 9 or Tri-CAP Ex. 10. Hence, under its reasoning, the PIC would have been equally unable to accept the proposal it advanced.

The Administrative Law Judge does not find, however, that the date of the proposal is the crucial consideration but that one must look to the contract

as finally executed. It is not until the contract is finally executed that the program funds are obligated and legal responsibilities are incurred. If the appropriate assurances, practices and procedures were not included in the final contract the PIC was asked to execute, it would have been free to reconsider its decision and accept a contract with the State or Tri-CAP. It did not need to do so here since the appropriate inclusions were contained in the final contract.

The only rational basis the Administrative Law Judge can posit for crediting the Tri-CAP argument is that the inclusion of such matters in the initial proposal would have allowed the PIC to make comparisons between similar conditions contained in differing proposals for purposes of the selection of an ultimate grant recipient. As initially noted, this argument has no application to the instant facts since the Tri-CAP proposal did not contain such assurances. The purposes of including such assurances in a proposal were fully accomplished in the instant case, however, since through conversations between RPVS, Ltd. and the PIC it was clear that the corporation had engaged the same accountants who had provided oversight to the State in its administration of the programs previously. moreover, the directors of the corporation, as previous program office managers of the State, were well aware of the ordinary and customary assurances needed to be provided. While it may have been better practice to include the final assurances in the proposal to provide a basis for comparison with other proposals, under the facts of the instant case, the Administrative Law Judge does not find that the failure to do so provides any ground for negating the selection.

The final argument advanced by Tri-CAP is that the directors of the corporation, at the time of the incorporation, were state employees whose divided loyalties, evidenced by the fact of incorporation, violated the State Department of Economic Security's code of conduct. Moreover, the directors of the corporation while still state employees, appeared at the PIC meeting and actively argued for acceptance of their proposal in opposition to the Tri-CAP proposal.

The Administrative Law Judge finds, under the circumstances of the instant

case, that the conflict of interest, if one existed, does not provide grounds for the negation of the contract.

The Administrative Law Judge need not decide whether the formation of the corporation without any activity adverse to the interests of the Department of Economic Security while it was a viable contender for selection as a service provider was a literal conflict of interest on the part of the incorporators.

It could be argued that the fact of the corporation created divided loyalties in the employees and is the type of conflicting corporate opportunity that the code of ethics was designed to avoid. The motives of the former employees herein concerned are entirely understandable. In May of 1984, it became clear that the State would not receive the service provider contract. If the Department of Economic Security did not receive the contract as the service provider the employees would lose their employment with the State or, at least, be transferred out of their primary area of expertise. At least one of the incorporators, at the time of the PIC meeting of June 8, 1984, had already received his separation notice from the State, effective June 30, 1984. The employees took no action with respect to a contract proposal until after the State had been eliminated as a service provider.

While the motives of the employees are understandable, they are not sanctioned by the Administrative Law Judge. The existence of a corporation which can compete with the State of Minnesota in an area in which the employee is to provide loyal service to the State creates at least the potential for conflict which is to be avoided.

The code of conduct, however, is enforceable through sanctions against the employment of the person involved. In decisions regarding the open meeting law, the Minnesota Supreme Court has held that the remedies contained in the provision are exclusive and, in the absence of fraud, overreaching or undue influence, do not provide grounds for the negation of a contract. *Hibbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d, 757 (Minn. 1982); *Sullivan v. Credit River Township*, 299 Minn. 170, 217 N.W.2d 502 (1974).

Under the facts of the instant case, Tri-CAP does not assert, and there is no evidence in the record of any indication of, fraud, duress, undue influence or overreaching in the selection of the service provider. Rather, the final assertion of Tri-CAP is that the mere creation of the corporation provides grounds for obviating the selection. If the instant record contained evidence that the employees had used their positions with the State to influence the selection process for their private benefit or otherwise engaged in an active conflict of interest contrary to the public welfare, the Administrative Law Judge would seriously consider voiding the contract. That is not, however, the fact situation with which he is presented. The violation, if one existed, was technical and could have been remedied through employee sanctions. The actions of the state employees herein provide no basis for the negation of the contract.

While not an issue in the instant proceedings, it was asserted by Tri-CAP that the PIC has not adopted procedures for the local resolution of grievances as required by federal law. Since this issue was withdrawn by Tri-CAP, the record does not reflect whether local grievance procedures do in fact exist. It is clear, however, that Tri-CAP was not given a hearing before the PIC on its appeal but was merely informed by letter that PIC, on the basis of unstated evidence or considerations, had rejected the appeal. To the extent that the PIC does not have local grievance resolution procedures, it is urged to adopt such procedures. The model procedures for the resolution of grievances published by the Department of Economic Security could be used as a model for the required provisions.

B.D.C.

